83-5737

Office Supreme Court, U.S.
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ALEXANDER L. STEVAS
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No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

VERNON RAY COOPER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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QUESTIONS PRESENTED

1. Whether petitioner was denied the effective assistance of counsel in violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States?

2. Whether the exclusion of significant mitigating evidence in petitioner's capital sentencing hearing violated the Eighth or Fourteenth Amendments?

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THE SUPREME COURT OF FLORIDA

Petitioner Vernon Ray Cooper respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida in this case.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida is reported at ___ So. 2d ___ (Fla. 1983), and is attached hereto as Appendix A.

JURISDICTION

The judgment of the Supreme Court of Florida was entered on July 14, 1983. A timely petition for rehearing was denied on October 10, 1983. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), petitioner having asserted below and asserting herein deprivations of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> " In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence;"

the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

> " Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;"

and the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> " [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The facts of this case were summarized by the Supreme Court of Florida in the following manner:

> Cooper admitted at trial that he and one Steve Ellis robbed the grocery store, and that as they were making their escape in Cooper's black Camaro they were stopped by Deputy Wilkerson, who had stationed himself close to Interstate 10 in order to close off a possible escape route. There was conflicting testimony as to what then transpired. After being stopped, either Cooper or Ellis walked to Deputy Wilkerson's patrol car and fired two shots into his head. He was killed instantly.
>
> A prompt report of Wilkerson's death caused officers Bates and Joy to begin

> patrolling Interstate 10. They observed and stopped the Camaro after it had crossed into Alabama. Ellis, who was driving, left the Camaro and approached Bates, who began to frisk him. Joy approached the Camaro, observed Cooper sitting in the passenger's seat, and returned to his patrol car. While doing so, he heard a shotgun fired from inside the Camaro. At that moment Ellis pulled a gun on Bates, but Bates reacted faster and shot Ellis fatally. Cooper then drove off in the Camaro. Both the officers fired several shots and gave chase, but Cooper escaped into the countryside. Cooper was captured the next day, with a shotgun in his possession, after a manhunt by over four hundred persons.

Cooper v. State, 336 So.2d 1133, 1136 (Fla. 1976).

Petitioner was convicted of first degree murder and robbery on June 21, 1974, and sentenced to death on July 1, 1974. The conviction and sentence were affirmed by the Supreme Court of Florida on July 8, 1976. Cooper v. State, supra. This Court denied certiorari in Cooper v. Florida, 431 U.S. 925 (1977).

A Motion to Vacate, Set Aside or Correct Sentence pursuant to Florida Rule of Criminal Procedure 3.850 was filed on May 21, 1979, in the Circuit Court of the First Judicial Circuit in and for Escambia County. On September 7, 1979, the trial court conducted an evidentiary hearing on the motion to vacate. The trial court denied the motion on October 28, 1980. This denial of post-conviction relief was appealed to the Supreme Court of Florida, which affirmed the denial of the motion to vacate on July 14, 1983. Cooper v. State, ___ So. 2d ___ (Fla. 1983). Petitioner then filed a Motion for Rehearing with the Supreme Court of Florida. The court denied the Motion for Rehearing in an Order dated October 10, 1983.

In the evidentiary hearing held on the Rule 3.850 Motion to Vacate, substantial evidence was adduced regarding the adequacy of trial counsel's preparation for and performance at trial. Trial counsel, an Assistant Public Defender named John Grass, had been recently admitted to the Bar and had only handled one jury trial. Motions Hearing [hereafter MH] 149, 175,

176. During the period of pretrial motions and hearings, the trial judge grew so concerned about the inadequacy of Mr. Grass' performance that he had a private conference with the Public Defender, Ronald Shelley, and expressed his expectation that Mr. Grass would have assistance in the courtroom. (MH. 67, 131, 133, 134). Although Mr. Shelley then took on the nominal title of lead counsel in the case, he did not handle any of the preparation of the case (MH 30, 150, 308,310-13), rarely consulted with Mr. Grass about the case (see MH 151-52, 167, 201, 241-43, 257-59), and even in the final stages of trial preparation, did not confer with Mr. Grass on the theory of the defense to be presented at trial (MH 313). During the trial itself, Mr. Shelley sat at counsel table and participated during the first two days of trial but then, on the third day, abruptly left the proceedings and never returned. (MH. 392.) He left without advising Mr. Grass, the defendant, or the court that he was abandoning the defense (MH. 163, 165, 392); indeed, Mr. Grass expected Mr. Shelley to return. (MH. 163-65.) Throughout the remaining three days of the guilt and sentencing phases, Mr. Grass acted as the sole defense attorney.

The evidence concerning the adequacy of trial counsel's performance relates to three separate areas: preparation for trial; performance in the guilt phase of trial; and preparation for and performance in the sentencing hearing. With respect to pre-trial preparation, there were the following omissions in investigation or preparation: defense counsel failed to obtain and subsequently failed to completely listen to a tape of police radio transmissions that was important in establishing the amount of time that elapsed between the robbery and the killing, MH. Appendix 12-22, 236, 238; counsel failed to make sufficient efforts to locate certain defense witnesses

(see MH Appendix 206-09, 217-32); despite counsel's receipt of information indicating likely testimony by a State ballistics expert, counsel failed to attempt to interview this crucial witness and later claimed surprise when the State presented this expert (see MH Appendix 5-6, 193, 283); finally, counsel failed to investigate the possibility of an intoxication defense despite the fact that the defendant told counsel that he had been drinking heavily prior to the offense and was experiencing the effects of severe intoxication (MH 346-37).

The most notable manifestation of inadequacy of representation in the course of the trial itself was lead counsel's abrupt abandonment of the defendant and departure from the courtroom on the third day of trial. Left on his own, junior counsel John Grass made the following errors: in moving for judgment of acquittal, he failed to move for acquittal on the robbery charge (trial, vol. XII, pp. 234-44, vol. XIII, pp. 163-64); he failed to file any written requests for jury instructions, including any requests for a circumstantial evidence instruction regarding the defendant's intent; he failed to ask the court reporter to record his closing argument and thereby precluded any appellate issues relating to that argument; and he failed to make any objections to improper closing arguments by the prosecutor that violated state caselaw. See MH Appendix 310-11 (prosecutorial argument that jury should uphold law and order; argument was deemed improper in Johnson v. State, 191 So. 847 (Fla. 1939)); see also Trial transcript Vol. XIV p. 113 (prosecutorial argument on safety of community violating standards set forth in Grant v. State, 194 So. 2d 612, 615 (Fla. 1967)).

At the sentencing phase, Mr. Grass made no attempt to introduce mitigating evidence of petitioner's severe drinking problem and did not bring out the fact that he was extremely

inebriated at the time of the robbery and shooting. Counsel did not present to the jury petitioner's explanation that he acted under the dominance of his accomplice or petitioner's explanations of his prior convictions. Perhaps most significant, counsel never even discussed with the petitioner the possibility that petitioner himself could take the stand in the capital sentencing hearing. MH 352.

During the sentencing hearing, a central issue arose concerning the defense's right to present evidence of mitigating circumstances other than those circumstances expressly enumerated in the state statute. The State argued that the defense was limited to the statutory mitigating circumstances. Tr. Vol. XIV, at 22, 24, 26. The trial judge ruled in favor of this position, stating:

> I think the guidelines though are necessarily those which are actually enumerated in the statutes or those that might be more or less a side issue of those matters.

Tr. Vol. XIV, at 23. Consistent with this approach, the trial court excluded the following mitigating evidence proffered by the defense:

(1) Evidence of the defendant's employment (Tr. Vol. XIV, at 24, 27, 60-61);

(2) Petitioner's attitude towards his prior incarceration (id. at 34-35);

(3) A specific incident illustrating petitioner's patience and good character (id. at 46-49);

(4) Petitioner's marital plans and relationships (id. at 51-52);

(5) The accomplice's reputation for violence (id. at 53, 81);

(6) Specific prior acts of violence by the accomplice such as beating his son and shooting at his boss' car while

stating he would kill her (id. at 74-76);

(7) The accomplice's practice of keeping firearms on the shelves of his apartment and carrying a gun in his car (id. at 68-81);

(8) Petitioner's fear of the accomplice and attempts to avoid him by going out and not answering the telephone on various occasions (id. at 70-71).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

1. The issue of ineffective assistance of counsel was first raised in the post-conviction Motion to Vacate, Set Aside or Correct Sentence pursuant to Florida Rule of Criminal Procedure 3.850, which was filed on May 21, 1979, in the Circuit Court of the First Judicial Circuit in and for Escambia County. The trial court conducted an evidentiary hearing on this issue on September 7, 1979. On October 28, 1983, the trial court denied the Motion to Vacate. On the issue of adequacy of counsel, the court briefly ruled that: "[a] review of the trial transcript reveals that the trial counsel was not ineffective in view of the totality of the trail [sic]." Order Denying Motion to Vacate, at 2.

On appeal to the Supreme Court of Florida, the appellate court affirmed the trial court's rejection of the ineffectiveness of counsel claim, stating:

> The issue of ineffective assistance of counsel at Cooper's original trial was explored extensively at the hearing on Cooper's 3.850 motion. The trial court concluded that counsel was not ineffective. We have reviewed the record to determine whether this finding is supported by competent substantial evidence. The argument between Cooper and the State on this issue boils down to a verbal dispute as to whether counsel was extraordinarily canny (as the

> State suggests) or unwittingly negligent (as Cooper suggests). Both arguments are abstractly persuasive, but, in light of the facts developed at the evidentiary hearing and applying the standard we announced in Knight v. State, 394 So.2d 997 (Fla. 1981), we have little difficulty in concluding that the trial judge properly rejected Cooper's claim of ineffective assistance of counsel.

Cooper v. State, slip opinion at 1-2.

2. At the capital sentencing hearing, petitioner's counsel attempted to introduce evidence of several non-statutory mitigating circumstances. In response to the prosecutor's argument that the defense was necessarily limited to the mitigating circumstances expressly enumerated in the state statute, the trial court ruled that the defense would be limited to the statutorily enumerated mitigating circumstances. Tr. Vol. XIV, at 23; see also R-190 (declaring that the death sentence was being imposed because "no statutory mitigating circumstances were presented by the evidence to be weighed against the aggravating circumstances"). The trial court then excluded the various forms of non-statutory mitigating evidence proffered by the defense. Tr. Vol. XIV, at 24, 27, 34-35, 46-49, 51-53, 60-61, 68-81.

The direct appeal to the Florida Supreme Court, like the trial itself, occurred prior to the decision in Lockett v. Ohio, 438 U.S. 586 (1978). In the appeal, petitioner argued that the trial court had erred in excluding the proffered mitigating evidence. The Florida Supreme Court rejected this position, stating that evidence concerning matters other than the statutorily "itemized . . . mitigating circumstances . . . have no place in the proceeding." Cooper v. State, supra, 336 So.2d at 1139.

The post-conviction Rule 3.850 Motion to Vacate was filed

after the Lockett decision had been handed down, and for the first time challenged the exclusion of the proffered mitigating evidence as a violation of the Eighth and Fourteenth Amendment principles enunciated in Lockett. The trial court rejected this contention, stating that "Defendant's counsel was permitted to introduce mitigating circumstances that were considered relevant evidence and was not restrict [sic] in presenting same to the jury." Order Denying Motion to Vacate, at 1. In affirming the trial court's denial of post-conviction relief, the Supreme Court of Florida held that petitioner was barred from raising a collateral attack upon the exclusion of non-statutory mitigating circumstances because this issue should have been raised on direct appeal. The court declared that "Lockett did not change the law of Florida" in that pre-Lockett state law permitted the consideration of all non-statutory mitigating circumstances. The court further declared that counsel must be charged with knowing this aspect of pre-Lockett state law and with failing to apply this knowledge in framing the issues on direct appeal. Cooper v. State, supra, slip opinion at 2-3.

REASONS FOR GRANTING THE WRIT

I.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

As this Court has repeatedly emphasized, the "Sixth Amendment does more than require the States to appoint counsel for indigent defendants. The right to counsel prevents the state from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance." Cuyler v. Sullivan, 446 U.S. 335 (1980). "The right to effective assistance of counsel is so vital to a fair trial that courts are compelled to examine every potential infringement of that right with the most exacting scrutiny." Zuck v. Alabama, 588 F.2d 436, 440 (5th Cir. 1979). The effectiveness of counsel is particularly vital in capital cases, for "the seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance." Proffitt v. Wainwright, 685 F.2d 1227, 1247 (11th Cir. 1982).

Under the standards prevailing in the Fifth Circuit, a defendant is entitled to counsel "reasonably likely to render and rendering reasonably effective assistance." MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960)(emphasis in original); Goodwin v. Balkcom, 684 F.2d 794, 804 (11th Cir. 1982). Even when representation by counsel proves otherwise effective, a serious in-court failure to protect a defendant's fundamental rights renders the representation below Sixth Amendment standards. See, e.g., Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979). These essential requisites of effective representation of course extend to sentencing and other

post-trial stages of a criminal case. See, e.g., Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982)(en banc), cert. granted, 77 L. Ed. 2d 1332 (1983); see generally Goodpaster, "The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases," 58 N.Y.U. L. Rev. 274 (1983).

The performance of petitioner's defense attorneys fell far below the minimum standards of representation required by the Constitution. At every stage, the attorneys failed to take the steps that were obviously necessary to save their client from a sentence of death.

Defense attorney John Glass' lack of experience and attorney Ronald Shelley's lack of supervision over Mr. Glass took their toll in the defense's preparation for trial. As previously described, defense counsel failed to obtain and subsequently failed to completely listen to a tape of police radio transmissions that was important to establishing the amount of time that elapsed between the robbery and the killing; counsel failed to make sufficient efforts to locate certain defense witnesses, as well as to interview a crucial State ballistics expert; and counsel failed to investigate the possibility of an intoxication defense despite the fact that petitioner told counsel that he had been drinking heavily prior to the offense and was experiencing the effects of severe intoxication. As the court concluded in Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978), adequate investigation and interviews with known witnesses are essential to providing effective representation. "Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel." Id. at 1149-50. A "lawyer who is not familiar with the facts

and law cannot meet that required minimal level (of reasonably effective assistance)." Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974).

The defense attorneys' performance at trial further violated Sixth Amendment requirements. Lead counsel Ronald Shelley's abrupt disappearance from the courtroom and the case in the middle of trial constituted an impermissible abandonment of his duty to represent the petitioner. Compare Anders v. California, 386 U.S. 738 (1967)(leave of court required for counsel to withdraw on appeal); Summers v. Thompson, 444 F. Supp. 312, 314 (M.D. Tenn. 1977)("An attorney in a criminal case may not withdraw from employment without giving due notice of his withdrawal to his client, and without taking reasonable steps to avoid foreseeable prejudice to the rights of his client."); see ABA Code of Professional Responsibility, DR 2-110.

Left to his own devices, junior counsel John Glass made numerous errors in the trial and the sentencing hearing. As described above, Mr. Glass during trial failed to move for judgement of acquittal on one of the counts, failed to request jury instructions, failed to have his closing argument preserved for appellate review, and failed to object to inflammatory arguments by the prosecuting attorney that violated state caselaw. During the sentencing hearing, counsel did not present to the jury petitioner's explanation that he was acting under the dominance of the accomplice, and also did not present any mitigating evidence of petitioner's intoxication at the time of the offense. Indeed, counsel did not even inform petitioner that he had the right to take the stand in the sentencing hearing.

Thus, there are numerous instances in which defense

counsel failed to take the steps necessary to protect their client's interests. In each of these instances, appropriate action on the part of the attorney would have had the likely result of producing an acquittal or, at the very least, a non-capital sentence. Given the magnitude of the errors and the seriousness of the penalty that was at stake, this Court should conclude that the representation provided to petitioner fell below constitutional standards.

Petitioner respectfully suggests that it may be appropriate to stay consideration of this issue pending the Court's resolution of related questions concerning the precise nature of the Sixth Amendment right to effective assistance of counsel in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982)(en banc), cert. granted, 77 L. Ed. 2d 1332 (1983) and United States v. Cronic, 675 F.2d 1126 (10th Cir. 1982), cert. granted, 75 L. Ed. 2d 430 (1983).

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION OF SIGNIFICANT MITIGATING EVIDENCE IN PETITIONER'S SENTENCING HEARING VIOLATED THE EIGHTH OR FOURTEENTH AMENDMENTS

Prior to addressing the merits of this claim, it is necessary to resolve a jurisdictional question about the propriety of raising this contention in this petition for certiorari. The Supreme Court of Florida purported to resolve this Eighth Amendment claim by applying a state procedural bar to raising claims for the first time in post-conviction proceedings that could have been and should have been previously raised on direct appeal. Declaring that Florida law has always recognized a Lockett right to present evidence of non-statutory mitigating circumstances, the state supreme court concluded

that petitioner should have sought vindication of this Eighth Amendment right on direct appeal even though the right had not yet been established by this Court in Lockett.

Although the state supreme court clothed its decision in terms of a state procedural ground, and although state court decisions resting solely on nonfederal grounds are not normally subject to review by this Court, a special exception exists where the nonfederal ground is not

> a tenable one. In other words, Supreme Court review cannot be evaded by a nonfederal ground "so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the federal question." Enterprise Irrig. Dist. v. Farmers' Mut. Canal Co., [243 U.S. 157,] 164 . . . .

Stern & Gressman, Supreme Court Practice 239 (5th ed. 1978). Under this principle, a federal court can reject a state court determination of state law where the state court has used state law as a subterfuge or pretext for evading a federal claim. See Mullaney v. Wilbur, 421 U.S. 684, 691 & n.11 (1975); Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945); McCoy v. Shaw, 277 U.S. 302, 303 (1928); Ward v. Board of County Comm'rs, 253 U.S. 17, 22 (1920); Vandalia R.R. v. Indiana ex rel. South Bend, 207 U.S. 359, 367 (1907); Terre Haute & Indianapolis R.R. Co. v. Indiana ex rel. Ketcham, 194 U.S. 579, 589 (1904). The federal claimant need not surmount the difficult barrier of proving the state's actual intent to subvert federal jurisdiction; the federal court can infer such an intent where the state court application or construction of state law lacks "fair or substantial" support in state law. Lawrence v. State Tax Comm'r, 286 U.S. 276, 282

(1932); Broad River Power Co. v. South Carolina, 281 U.S. 537, 540 (1930); Ward v. Board of County Comm'rs, 253 U.S. 17, 22 (1920); see New York Times v. Sullivan, 376 U.S. 254, 276 n.4 (1964)(state assertion of personal jurisdiction on ground of general appearance has fair and substantial basis in state law); Williams v. Georgia, 349 U.S. 275, 399 (1955) (Clark, J., dissenting)(state ground inadequate "where the circumstances give rise to an inference that the state court is guilty of an evasion -- an interpretation of state law with the specific intent to deprive a litigant of a federal right"); Leathe v. Thomas, 207 U.S. 93, 99 (1907)(state ground inadequate where "so palpably unfounded that it could not be presumed to have been entertained").

The core of the Florida Supreme Court's application of a procedural bar to post-conviction review of this Eighth Amendment claim is the court's statement that Florida law has always respected a Lockett-type right to present evidence of non-statutory as well as statutory mitigating circumstances. Yet, an independent review of the Florida caselaw existing at the time of petitioner's trial shows just the opposite. Indeed, Mr. Justice Stevens demonstrated this point in his review of Florida caselaw in his concurring decision in Barclay v. Florida, 77 L. Ed. 2d 1134 (1983). Mr. Justice Stevens explained that prior to the legislative amendment of the Florida death penalty statute in 1979, the statute directed the sentencing judge to

> make three separate determinations in order to impose the death sentence: (1) that at least one statutory aggravating circumstance has been proved beyond a reasonable doubt; (2) that the existing statutory aggravating circumstances are not outweighed by statutory mitigating circumstances; and (3) that death is the appropriate penalty for the individual defendant.

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FILED
DEC 16 1983
ALEXANDER L. STEVAS
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SUPREME COURT OF THE UNITED STATES

VERNON RAY COOPER,

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-VS- NO. 83-5737

STATE OF FLORIDA,

RESPONDENT.

RESPONSE TO
PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

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Id. at 1151 (footnotes omitted). Mr. Justice Stevens then explained that non-statutory mitigating circumstances played no role whatsoever in making either of the first two determinations. Id. at 1151 n.2. It is only after the first two stages are completed and "the legal threshold is crossed" (id.), that non-statutory mitigating circumstances can have an effect on the sentencing determination. Thus, to the extent that non-statutory mitigating circumstances can be considered by the sentencer, they must be considered in the third stage "as part of the discretionary post-threshold determination." Id. But the fatal flaw in the procedure at the time of petitioner Vernon Cooper's trial and appeal was that the sentencer did not have the discretion to consider non-statutory mitigating circumstances (or anything else) in the third stage. As Mr. Justice Stevens explained,

> With regard to the third stage, Florida case law appears to have evolved over time. An early case suggested that there was no discretion after the first two criteria had been satisfied. Cooper v. State, 336 So.2d 1136, 1142 (Fla. 1976) ("Imposition of the death penalty is never pleasant. Here it cannot be avoided. The statute demands a decision from this Court, and we are bound to follow the law. In this case, there were three aggravating and no mitigating circumstances. There is no alternative to the death penalty.")

Barclay v. Florida, supra, at 1151-52 n.3 (Stevens, J., concurring). Accordingly, state law at the time was not in conformance with the Lockett mandate that a capital sentencing authority must be able to give meaningful consideration to all mitigating circumstances including non-statutory circumstances.

The language of the Florida Supreme Court's original decision in petitioner's case in 1976 was as clear as it possibly could be in declaring that a capital sentencing hearing was limited to the mitigating circumstances expressly enumerated in the state statute. The 1976 opinion stated:

> The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case these itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in the proceeding 7/
>
> . . .
>
> The legislature chose to list the mitigating circumstances . . . and we are not free to expand the list.

7/ The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6); (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist . . . ." (emphasis added [by Florida Supreme Court]). This limitation is repeated in Section 921.141(3), governing the trial court's decision on the penalty. Both sections 921.141(6) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty.

Cooper v. State, supra, 336 So.2d at 1139 & n.7. It is evident that the trial judge in petitioner Cooper's case understood the law to be that non-statutory mitigating circumstances must be excluded. That was the crux of his ruling excluding the petitioner's various proffers of mitigatory evidence. Tr. Vol. XIV, at 23 ("I think the guidelines though are necessarily those which are actually enumerated in the statutes or those that might be more or less a side issue of those matters."); see also R-190 (trial court's statement that death sentence was being imposed because "no statutory mitigating circumstances were presented by the evidence to be weighed against the aggravating circumstances").

The Florida Supreme Court has now adopted a revisionist history that demands that all readers of the 1976 Cooper decision ignore the plain import of its language. According to the Florida Supreme Court in its recent decision in this case, the state law has always been consistent with Lockett's recognition of the right to present non-statutory mitigating circumstances. The disingenuousness of this contention is highlighted by the fact that the Florida Supreme Court has itself recently acknowledged in a different case that Lockett represented a break with prior state law on the subject of non-statutory mitigating circumstances. In Muhammad v. State, 426 So.2d 533, 538 (Fla. 1982), the state supreme court commented:

> Appellant next argues that defense counsel was ineffective in the sentencing phase of the trial in that he did not present evidence of nonstatutory mitigating considerations based on appellant's character and background. This contention is without merit. It presupposes that counsel was expected to predict the decision in Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

If it were correct to say that Florida state law always was consistent with the dictates of Lockett, then there would have been nothing for the defense attorney in Muhammad to "predict": he would have been ignorant of the current state of the law and thus ineffective. But that is not the case. As the Florida Supreme Court implicitly recognized in Muhammad, the Lockett decision significantly changed the nature of state law on non-statutory mitigating circumstances and the change was sufficiently substantial that it was beyond the capacities of attorneys to predict the change.

As this analysis has shown, the Lockett claim was not available to petitioner at the time of his direct appeal. Accordingly, his failure to raise the claim on direct appeal cannot operate as a bar to his presentation of the claim in state

post-conviction proceedings. This Court therefore can address the merits of the Eighth Amendment claim.

The resolution of the merits of the claim is a fairly simple matter. This Court declared in Lockett and Eddings v. Oklahoma, 455 U.S. 104 (1982) that "the sentencer in capital cases must be permitted to consider any relevant mitigating factor." Eddings, supra at 112. In the present case, the trial court excluded several relevant mitigating factors (such as the defendant's prior employment, marital plans and relationships, and examples of his patience and good character, as well as evidence of the accomplice's far greater propensity to commit acts of violence). These factors were excluded by the trial court simply because they did not fit within the categories of mitigating circumstances enumerated in the state statute. Under Lockett and Eddings, this exclusion of mitigating evidence constituted a fundamental violation of petitioner's Eighth and Fourteenth Amendment rights and requires a new sentencing hearing.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted or, in the alternative, consideration of the petition should be stayed pending the Court's decision in Washington v. Strickland.

Respectfully submitted,

Randy Hertz
704 Fifth Street S.E.
Washington D.C. 20003
(202) 628-1200

ATTORNEY FOR PETITIONER

Dated: Washington D.C.
November 9, 1983

83-5737

Office Supreme Court, U.S.
FILED
NOV 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

VERNON RAY COOPER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

The petitioner, Vernon Ray Cooper, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the petitioner, who is presently incarcerated at the Florida State Prison at Starke, Florida. Mr. Cooper's affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

Randy Hertz
704 Fifth Street S.E.
Washington D.C. 20003

ATTORNEY FOR PETITIONER

No. 83-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

VERNON RAY COOPER, Petitioner,	:	
v.	:	No.
STATE OF FLORIDA, Respondent.	:	AFFIDAVIT

DISTRICT OF COLUMBIA: ss:

RANDY HERTZ, being duly sworn, states:

1. I am an attorney for Vernon Ray Cooper, the petitioner in the above-captioned action, and I make this affidavit in support of Mr. Cooper's motion for leave to proceed in forma pauperis. My representation of Mr. Cooper is without remuneration.

2. Mr. Cooper is presently in the custody of the State of Florida and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Cooper by me and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Cooper is attached hereto.

3. Counsel was appointed to represent Mr. Cooper in these post-conviction proceedings.

4. I am informed and believe that because of his poverty, Mr. Cooper is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Cooper is entitled to redress in this action.

Randy Hertz

Sworn to before me this
9th day of November, 1983.

NOTARY PUBLIC

My Commission Expires October 31, 1984

No. 83-5737

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RECEIVED
NOV 28 1983
OFFICE OF THE CLERK
SUPREME COURT U.S.

VERNON RAY COOPER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

I, Vernon Ray Cooper, being duly sworn, depose and say in support of my motion for leave to proceed without being required to prepay costs or fees and to proceed in forma pauperis:

1. I am the petitioner in the above-captioned action.

2. Because of my poverty, I am unable to pay the costs of said cause. I own no real or personal property. I am incarcerated and receive no income from my savings.

3. I am unable to give security for said cause.

4. Counsel is serving on my behalf without remuneration. At trial and on appeal, lawyers were appointed to represent me because I was indigent.

5. I believe that I am entitled to redress.

6. The nature of said cause is briefly stated as follows: I was convicted in the Circuit Court of the First Judicial Circuit in and for Escambia County, a trial court of the State of Florida, of murder and robbery, and was sentenced to death. I am being held at the Florida State Prison in Starke, Florida. I believe that errors were committed during the course of my trial in violation of my constitutional rights and that my conviction and death sentence were imposed upon me in violation of my constitutional rights.

Vernon Ray Cooper
VERNON RAY COOPER

Sworn to before me this
17 day of November, 1983.

Supreme Court of Florida

No. 59,872

VERNON RAY COOPER, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[July 14, 1983]

PER CURIAM.

Vernon Cooper was convicted of first-degree murder and sentenced to death in 1974. We affirmed his conviction and sentence, Cooper v. State, 336 So.2d 1133 (Fla. 1976), and the Supreme Court of the United States denied his petition for certiorari, Cooper v. Florida, 431 U.S. 925 (1977). Subsequently, Cooper filed a motion for postconviction relief which was denied by the trial court after an evidentiary hearing. He now appeals the denial of his request for postconviction relief. We affirm.

Among the issues which were raised in the proceeding below and which are renewed here are suggestions that counsel was ineffective at Cooper's trial and that the trial court violated the dictates of Lockett v. Ohio, 438 U.S. 586 (1978), in limiting the introduction of mitigating evidence relevant to Cooper's character, his record, and the circumstances of his offense.

The issue of ineffective assistance of counsel at Cooper's original trial was explored extensively at the hearing on Cooper's 3.850 motion. The trial court concluded that counsel was not ineffective. We have reviewed the record to determine

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whether this finding is supported by competent substantial evidence. The argument between Cooper and the State on this issue boils down to a verbal dispute as to whether counsel was extraordinarily canny (as the State suggests) or unwittingly negligent (as Cooper suggests). Both arguments are abstractly persuasive, but, in light of the facts developed at the evidentiary hearing and applying the standard we announced in Knight v. State, 394 So.2d 997 (Fla. 1981), we have little difficulty in concluding that the trial judge properly rejected Cooper's claim of ineffective assistance of counsel.

The other issues now presented were either raised or could have been raised in the original proceedings and are not appropriate matters for collateral attack. Hargrave v. State, 396 So.2d 1127 (Fla. 1981); Washington v. State, 397 So.2d 285 (Fla. 1981); Watt v. State, 387 So.2d 922 (Fla.), Cert. denied, 449 U.S. 1067 (1980). Cf. United States v. Frady, 456 U.S. 152 (1982); Engle v. Isaac, 456 U.S. 107 (1982). Only one of these issues merits discussion. This is Cooper's claim that the trial court violated the dictates of Lockett by unduly restricting the introduction of evidence relevant to nonstatutory mitigating circumstances. In his initial appeal from his conviction and sentence, Cooper raised the question of whether certain evidence he had proffered was probative and relevant to the statutory mitigating factors, and we answered this question in the negative. He now attempts again to raise the issue of relevancy of this evidence but on a different basis than originally argued in his direct appeal. He contends that Lockett, decided subsequent to his trial and appeal, compels a reversal of his sentence. When his original appeal was taken to this Court, however, Florida's law was consistent with the pronouncement of Lockett. In Songer v. State, 365 So.2d 696 (Fla. 1978), Cert. denied, 441 U.S. 956 (1979), we held that the wording of the death penalty statute and the construction placed by this Court on that statute indicate unequivocally that the list of mitigating factors contained in this statute is not exhaustive.

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we referred to our earlier decisions in Buckrem v. State, 355 So.2d 111 (Fla. 1978); Washington v. State, 362 So.2d 658 (Fla. 1978), cert. denied, 441 U.S. 937 (1979); McCaskill v. State, 344 So.2d 1276 (Fla. 1977); Chambers v. State, 339 So.2d 204 (Fla. 1976); Meeks v. State, 336 So.2d 1142 (Fla. 1976); Messer v. State, 330 So.2d 137 (Fla. 1976); and Halliwell v. State, 323 So.2d 557 (Fla. 1975), among others, to demonstrate this Court's constant view that all relevant circumstances may be considered in mitigation and that the statutory factors merely indicate principal factors to be considered. We made clear that Lockett did not change the law in Florida since our law preexisting Lockett was consistent with the dictates of Lockett.

Balancing the goals of the criminal justice system of ensuring finality of decisions and of ensuring fairness and uniformity in individual cases, in Witt v. State, we addressed the question of the significance of a change in decisional law on the finality of a fully adjudicated capital case. We explained the nature of a change of law that would be considered in a capital case under Rule 3.850 and said that this change of law must emanate from this Court or the Supreme Court of the United States, must be constitutional in nature, and must constitute a development of fundamental significance. Lockett did not change the law of Florida. Thus, Cooper, if he wanted to claim that the trial court unduly restricted the introduction of evidence relevant to nonstatutory mitigating circumstances, should have raised this claim on direct appeal. Having failed to do so, he may not now raise this claim for the first time in a Rule 3.850 motion. Postconviction proceedings are not intended to afford defendant a second appeal of matters that were or could have been raised on direct appeal, and a defendant cannot argue on appeal the relevancy of evidence on one ground and then by collateral

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attack again argue the relevancy of that evidence on a different ground.*

Accordingly, the trial court's denial of postconviction relief is affirmed.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD and EHRLICH, JJ., Concur
OVERTON and McDONALD, JJ., Concur in conviction, but dissent from sentence.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

---

*We incidentally note that the trial court did in fact allow some testimony relevant to nonstatutory mitigating factors.

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An Appeal from the Circuit Court in and for Escambia County

Jack H. Greenhut, Circuit Judge - Case No. 74-185

Judith J. Dougherty, Special Assistant Public Defender, Second Judicial Circuit, Tallahassee, Florida,

for Appellant

Jim Smith, Attorney General and Raymond L. Marky, Assistant Attorney General, Tallahassee, Florida,

for Appellee

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QUESTIONS PRESENTED

I. WHETHER THE PETITIONER HAS ESTABLISHED THE STATE COURT ERRED IN FINDING UNDER THE TOTALITY OF CIRCUMSTANCES THAT HE WAS PROVIDED CONSTITUTIONALLY ADEQUATE REPRESENTATION AT TRIAL.

II. DID THE SUPREME COURT OF FLORIDA ERR IN FINDING PETITIONER'S CLAIMS THAT MITIGATING EVIDENCE WAS IMPROPERLY EXCLUDED COULD NOT BE RAISED IN THE COLLATERAL PROCEEDING BECAUSE THE CLAIM COULD HAVE AND SHOULD HAVE BEEN RAISED ON HIS DIRECT APPEAL.

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PRELIMINARY STATEMENT

Respondent accepts that portion of the Petition for Writ of Certiorari setting forth the Citations to Opinions Below, Jurisdiction and Constitutional Provisions Involved. The decision of the Supreme Court of Florida sought to be reviewed herein is reported as Cooper v. State, 437 So.2d 1070 (Fla.1983).

STATEMENT OF THE CASE AND FACTS

Petitioner and his accomplice Steve Ellis committed an armed robbery of a grocery store in Pensacola, Florida. Petitioner acknowledged this in his confession to the authorities when apprehended, acknowledged this in his testimony before the jury at his trial and admitted it when he testified at the evidentiary hearing held on his motion to vacate brought pursuant to Fla.R. Crim.P. 3.850. In fact, because of the eyewitness testimony by the victims and in order to keep out adverse evidence, trial counsel stipulated that the robbery occurred.

The trial resolved around the question of whether the petitioner or Steve Ellis was the individual that fatally shot the deputy sheriff who stopped petitioner and Ellis as they were fleeing from the robbery. Witnesses for the State testified they saw a man who met petitioner's physical build leave the driver's side of the sheriff's automobile and enter the passenger side of the vehicle owned by petitioner. When petitioner's automobile was stopped a second time, he was in the passenger's seat. Petitioner offered testimony in an attempt to prove the person seen leaving the patrol car was seen entering the driver's side of his automobile. The weapon found on Ellis after a shootout occurred, during which Ellis was mortally wounded,--a shootout that petitioner initiated by shooting a shotgun at the law enforcement officers through the window of the Camaro--was

not the weapon that caused the death of Deputy Wilkerson. Petitioner attempted to explain this fact away by stating that Ellis had two guns and at Ellis' direction he threw the murder weapon out the window after Ellis shot Wilkerson.

After hearing the evidence, the argument of counsel and instructions to the jury petitioner was found guilty of first degree murder. A sentencing hearing was held to determine the penalty to be imposed wherein certain evidence was excluded by the trial judge on the grounds that it was not relevant or probative. The trial judge although uncertain as to the exact scope of evidence which could be admitted stated that he was going "to be liberal in the introduction of testimony by the defendant so far as character is concerned" (Vol. XIV 26), and in fact admitted most of the evidence that was proffered, including testimony that petitioner was gainfully employed after his release from prison on a prior robbery. There was never any issue raised by counsel that he had a right to introduce evidence beyond that enumerated in the statute. The trial judge excluded testimony proffered to show Ellis dominated petitioner because the witness was not competent to establish that fact.

After hearing the argument of counsel and receiving instructions from the jury, the jury recommended petitioner be sentenced to death. The trial judge entered his written order imposing death and specifically found that the "fatal shots were fired by Cooper." (R 190; App. A, p. 4).

An appeal was instituted to the Florida Supreme Court and that court affirmed the judgment and sentnece. Cooper v. State, 336 So.2d 1133 (Fla.1976) rejecting, among other arguments, the trial judge improperly excluded relevant mitigating evidence. Petitioner sought review in this Court on this very claim and certiorari was denied. Cooper v. Florida, 431 U.S. 925 (1977).

Thereafter the petitioner filed a motion to vacate in the State circuit court claiming counsel was ineffective and a number of other claims not relevant herein. After conducting an evidentiary hearing, reviewing the trial record and receiving written briefs on the issues, the trial judge denied the motion to vacate specifically finding "trial counsel was not ineffective in view of the totality of the trial" and that the trial judge did not improperly exclude any competent, relevant evidence of a mitigating nature which was offered by counsel and that no cause and prejudice had been demonstrated. (Appendix B).

On appeal from the denial of the motion to vacate the Florida Supreme Court affirmed the order of the circuit court. The court found the finding of competency was supported by the evidence and that all other claims were properly rejected because they were matters which could have been raised on direct appeal. Cooper v. State, 437 So.2d 1070 (Fla.1973). Other facts relevant to the disposition of the petition will be included in the argument portion of this response as they relate to the question presented.

WHY THE WRIT SHOULD NOT ISSUE

QUESTION I

DID THE SUPREME COURT OF FLORIDA ERR IN FINDING PETITIONER'S CLAIMS THAT MITIGATING EVIDENCE WAS IMPROPERLY EXCLUDED COULD NOT BE RAISED IN THE COLLATERAL PROCEEDING BECAUSE THE CLAIM COULD HAVE AND SHOULD HAVE BEEN RAISED ON HIS DIRECT APPEAL.

Petitioner contends this Court should grant review in this case because the performance of the "defense attorneys fell far below the minimum standards of representation required by the Constitution." (Pet. at p. 11). Petitioner has not attempted in any way to establish that this case presents a substantial federal question which merits the exercise of this Court's jurisdiction. Rather than even attempting to demonstrate the Florida Supreme Court determined an important federal constitutional question in the instant case, petitioner is merely seeking review to determine whether the Supreme Court of Florida correctly decided whether under the totality of circumstances he received reasonably effective assistance of counsel. Rule 17 of the Rules of this Court and Ross v. Moffitt, 417 U.S. 600, 616-617 (1974) makes it clear that such review is not the function of the Writ of Certiorari. See also: Stern & Gressman, Supreme Court Practice (5th Ed. 1978) pp. 254-317.

Petitioner asserts that he did not receive constitutionally adequate representation at trial because lead counsel: 1) was inexperienced; 2) failed to listen to a tape recording of a police transmission that was important in establishing the amount of time that elapsed between the robbery and the homicide; 3) failed to locate defense witnesses; 4) failed to depose a ballistics expert who was called by the State which allegedly came as a surprise to counsel; 5) failed to investigate an intoxication defense even though he was told by petitioner of it;

6) failed to move for a judgment of acquittal on the robbery charge; 7) failed to file proposed jury instructions including an instruction on circumstantial evidence; 8) failed to request counsel's closing argument thereby precluding appellate issues relating thereto; and 9) failed to object to improper closing argument by the prosecutor.

Nowhere in the petition is it shown how these alleged derilictions adversely affected this petitioner in any way, shape or form--much less prejudiced him in his defense. More importantly, petitioner presumes there was any need for counsel to perform the acts in question.

As to item (1) there was never any dispute between the parties as to how much time elapsed between the robbery and the homicide. It was approximately one-half hour and counsel used this fact in arguing his motion to sever the two charges, which would have eliminated the murder felony theory. Item (2) does not identify what witness or witnesses were not located and no evidence was presented at the hearing to show witnesses existed that should have been called by counsel at trial.

Item (3) is, under the facts of this case, frivolous. All the ballistics expert testified to was that the weapon found on Steve Ellis was not the murder weapon. Counsel already knew this because petitioner told him, as well as the authorities, that Ellis gave him the murder weapon after he (Ellis) shot the deputy and petitioner, at Ellis' directions, threw it out the window as they left the homicide scene (MH 370-371). Petitioner's trial attorney attempted to exclude the evidence at trial on the basis of a violation of Florida's rules of discovery, so that he would be able to argue there was no evidence that Ellis' weapon was not the murder weapon. Of course, because trial counsel's investigator knew of this witness before trial, the witness was allowed to testify by the trial judge, notwithstanding

the technical violation of the rules of procedure, and was sustained on petitioner's direct appeal. Cooper v. State, 336 So.2d at 1138. Since the experts' testimony was consistent with petitioner's version of the events, the failure to depose the witness did not and could not have adversely affected the defense, to-wit: that petitioner participated in the robbery but did not kill Deputy Wilkerson.

The claim that trial counsel did not investigate the alleged intoxication defense is likewise devoid of any merit for counsel testified at the evidentiary hearing that he considered the defense and found it inadequate (MH 187-188; 298-299). Moreover, petitioner's own testimony at said hearing established that he was not intoxicated to the point that a viable defense could have been predicated on intoxication (MH 359-368). Lastly, counsel's defense was that petitioner did not commit the homicide and therefore the defense of intoxication was one which he could legitimately elect not to present.

Petitioner's claim that counsel was ineffective for not moving for a judgment of acquittal on the robbery charge is somewhat incredible since the petitioner himself acknowledged his participation in said robbery. That together with the testimony of the victims of said robbery precluded the granting of such a motion. The undersigned does not understand the law to require counsel to file motions that have no foundation in fact or law. Needless to say, petitioner has not shown that had the motion been made it would have been granted.

Petitioner makes much of the fact that counsel did not request an instruction on circumstantial evidence but neglected to advise this Court that such an instruction was given in this case by the trial judge, which explains why there was no request--it was unnecessary!

Trial counsel's failure to request that his argument be transcribed is not evidence of ineffectiveness. At the evidentiary

hearing trial counsel wasn't even questioned in this regard. More importantly, counsel could not predicate an appellate argument for reversal on anything he said to the jury! As to his failure to object to the closing argument of the prosecutor, petitioner has failed to identify what specific comments should have been objected to. Even so, that omission hardly constitutes a denial of effective representation in petitioner's defense.

Petitioner makes much of the fact that Mr. Grass did not have extensive experience in the criminal law. Lack of experience does not mean an attorney was ineffective. Weinberger v. United States, 559 F.2d 401 (5th Cir.1977). The proper analysis is not counsel's past experience but his actions in representing petitioner in this case.

Petitioner has woefully fallen short of demonstrating the factual finding made by the trial court, which was sustained by the Florida Supreme Court, is not supported by the record. He has not shown any reason why this Court should grant further review in this case. Respondent submits that whether viewed under the test established in Washington v. Strickland, 693 F.2d 1243 (5th Cir.1982), cert.granted, 77 L.Ed.2d 1332 (1983) or the test established in Knight v. State, 394 So.2d 997 (Fla. 1981) and United States v. DeCoster, 624 F.2d 196 (D.C.Cir.1979), the petitioner received constitutionally adequate representation of counsel.

QUESTION II

DID THE SUPREME COURT OF FLORIDA ERR IN FINDING PETITIONER'S CLAIMS THAT MITIGATING EVIDENCE WAS IMPROPERLY EXCLUDED COULD NOT BE RAISED IN THE COLLATERAL PROCEEDING BECAUSE THE CLAIM COULD HAVE AND SHOULD HAVE BEEN RAISED ON HIS DIRECT APPEAL.

Petitioner acknowledges, as he must, that the alleged violation of his right to present relevant mitigating evidence outside the list enumerated in Section 921.141(6), Fla.Stat., was not raised on direct appeal and was raised for the first time in the collateral proceeding instituted pursuant to Fla. R.Crim.P. 3.850. This is evident from the Supreme Court's opinion below as well as the prior petition filed in this Court and the response thereto, Cooper v. Florida, Case No. A-324, wherein petitioner claimed the trial court erred in excluding evidence of mitigation that was relevant to sentencing.

As petitioner has noted, the Florida Supreme Court held in the decision sought to be reviewed that his present claim could have and should have been raised on the direct appeal and since it was not, it was barred from consideration pursuant to Rule 3.850 as interpreted by that court in Witt v. State, 387 So.2d 922 (Fla.1980), cert.denied, 449 U.S. 1067 (1980), and this Court's decision rendered in Engle v. Isaac, 456 U.S. 107 (1982). Those cases of course are predicated upon the legitimate need for finality in criminal cases. It hardly needs to be stated that the scope and extent of state collateral review is uniquely a state law question, not subject to this Court's supervision.

It is therefore uncontradicted that petitioner is guilty of a procedural default and was required to establish both cause and actual prejudice under the Sykes-Engle doctrine before he was entitled to relief.

Petitioner urges that cause is established by the fact that Lockett v. Ohio, 438 U.S. 586 (1978), which was decided after his direct appeal was disposed of, changed the law of Florida and if it did not, counsel was ineffective for being ignorant of the law. Respondent submits this argument, aside from being contradictory, is not well-founded.

First, the Supreme Court in Songer v. State, 365 So.2d 696 (Fla.1978), cert.denied, 441 U.S. 956 (1979) and in the opinion rendered in this case held Lockett did not change the law in Florida. Indeed, this Court in Lockett, citing to Proffitt v. Florida, 428 U.S. 242 (1976) recognized that the range of mitigating factors listed in the statute was not exclusive. 438 U.S. at 606, 57 L.Ed.2d at 991, no. 4. Secondly, the Florida statute itself makes that evident for in addition to the fact that it states the aggravating circumstances are limited and no such limitation appears with regard to the list of mitigating factors, the statute, at the time of petitioner's trial and appeal, clearly and unequivocally stated:

> In the proceeding [sentencing], evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7).

Respondent submits the language from Section 921.141(1) quoted above makes it rather clear that any mitigating evidence relevant to the sentence was admissible and that counsel for petitioner had the "working tools" to argue on direct appeal that the evidence proffered was admissible even though it did not fall within the ambit of the enumerated mitigating circumstances. Interestingly, other attorneys had argued this point and in Messer v. State, 330 So.2d 137 (Fla.1976), it was successfully argued that the trial judge erred in excluding the penalty imposed on a codefendant at Messer's sentencing hearing. The penalty imposed on a codefendant, of course, is not an enumerated mitigating circumstance under Section 921.141(6, Fla.

Stat. Messer was decided by the Supreme Court of Florida prior to the date petitioner's direct appeal was disposed of. See also: Songer v. State, supra, and the cases cited therein.

Inasmuch as counsel for petitioner had the tools to construct the claim belatedly tendered, the fact that Lockett was decided subsequent to his direct appeal does not constitute "cause" for the appellate default. Engle v. Isaac, supra, at 804. The Eleventh Circuit Court of Appeals has also recognized that even when the constitutional law has not been decided by this Court, if the "building blocks" for a particular claim are available, failure to raise the issue on appeal will not constitute cause for procedural default. Ford v. Strickland, 696 F.2d 804, 816 (11th Cir.1983) and Antone v. Strickland, 706 F.2d 1534, 1537 (11th Cir.1983).

Counsel's assertion that cause for the appellate default is satisfied by the now familiar claim of ineffective assistance of counsel is totally devoid of any legal merit, which is why no authority has been cited to support such a contention. In Engle itself this Court appreciated the fact that counsel might overlook a claim and, in fact, that not every astute attorney might perceive a constitutional claim, however, the Court properly noted that the ". . . Constitution guarantees criminal defendants only a fair trial and a competent attorney [and] . . . does not insure that defense counsel will recognize and raise every conceivable constitutional claim. . ." 456 U.S. at 734, 71 L.Ed.2d at 804. The Court thus concluded that ". . . Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for procedural default. . ." 456 U.S. at 134, 71 L.Ed.2d at 804.

Numerous circuit courts of appeal have rejected the spurious argument that the failure of counsel to properly present a claim

which results in a procedural default cannot be termed "ineffective assistance" so as to establish "cause" which excuses the default. Lumpkin v. Ricketts, 551 F.2d 680 (5th Cir.1977), cert.denied, 434 U.S. 957 (1977); Washington v. Estelle, 648 F.2d 276 (5th Cir.1981) and the cases cited therein; Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir.1978), cert.denied, 440 U.S. 974 (1979); Indiviglio v. United States, 612 F.2d 624 (2d Cir. 1979), cert.denied, 445 U.S. 933 (1980) and Jones v. Jago, 701 F.2d 45, 47 (6th Cir.1983); Birt v. Montgomery, 709 F.2d 690 (11th Cir.1983) and Sullivan v. Wainwright, 695 F.2d 1306 (11th Cir.1983). All of the aforementioned decisions recognize that the adoption of such a concept would "effectively eliminate any requirement of showing cause at all." Lumpkin, supra, at 683 and would circumvent Engle. Jones v. Jago, supra, at 47.

Respondent submits that the petitioner has not demonstrated the requisite cause for the appellate procedural default and thus the Court should not consider whether he has demonstrated actual prejudice. Moreover, the respondent submits no such showing could be made on this record for the excluded evidence was not competent or relevant. Petitioner's prior employment was allowed into evidence during the guilt phase of his trial and thus it was before the jury. As to his marital plans and relationships, respondent submits this evidence is irrelevant and nothing more than an appeal to the sympathy of the jury. The evidence relative to his codefendant's propensity for violence is not a matter which is relevant to petitioner's character and thus not covered by Lockett. It should be remembered the trial judge found as a fact that petitioner fired the fatal shot. Whether Steve Ellis was more violent than petitioner simply is beside the point, and the exclusion of evidence to that effect does not constitute a fundamental constitutional defect in the sentencing proceeding that would require the sentence of death be vacated.

CONCLUSION

Petitioner has failed to demonstrate any substantial federal question exists which merits the exercise of this Court's discretionary review. Accordingly, the Petition for Wirt of Certiorari should be denied.

Respectfully submitted,

JIM SMITH
Attorney General

Raymond L. Marky

RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, FL 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been forwarded to Mr. Randy Hertz, 704 Fifth Street, S.E., Washington, D. C. 20003, via U. S. Mail, this 14th day of December 1983.

Raymond L. Marky

Raymond L. Marky
Assistant Attorney General

APPENDIX A

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

CASE NO. 74-185

VERNON RAY COOPER,

Defendant.

11-3-80

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ATTORNEY GENERALS OFFICE

ORDER DENYING
MOTION TO VACATE

A careful review of the transcript of the evidentiary hearing and the major portions of the trail transcript have been made to determine whether the interest of justice requires a new trial, with the result that I find no reversible error is made to appear, and the evidence in the record does not reveal that the ends of justice require that a new trial be awarded.

FINDINGS:

1. As to the first allegation of the Motion to Vacate, it is determined from a review of the transcript that the trial judge permitted all mitigating evidence that defense counsel submitted, including totally irrelevant evidence in mitigation, be presented to the jury. Defendant's counsel has extracted from the cases cited in support of the motion factual bases that are totally irrelevant to the instance offense and sentence. The dominance of Defendant was not substantiated by the defense witnesses who testified at the trial. Intoxication was not made an issue at the trail of the case and would only have been injected in the sentence phase to "muddy the water".

2. As stated in the above paragraph, Defendant's second allegation is determined to be inapplicable as Defendant's counsel was permitted to introduce mitigating circumstances that were considered relevant evidence and was not restrict in presenting same to the jury. Defendant has not established any cause and prejudice. Defendant was permitted to introduce

evidence from members of the Defendant's family and his girl friend as mitigating factors.

3. The third allegation of Defendant's motion is without merit. The Court's instructions to the jury has already been resolved by the Florida and U. S. Supreme Court, and this Court will not permit Defendant's counsel to replow ground that has already been plowed.

4. I find this contention in Paragraph Four of the motion was a matter which could have been raised on direct appeal and thereby is unavailable in a collateral attack on the judgment. Meeks v. State 382 So2nd 673.

The fact that the Defendant's collateral attack is alleged to be one of constitutional dimension does not preclude a waiver by the failure to assert it on direct appeal.

5. Defendant failing to offer any argument on Paragraph Five of his motion, the same is deemed waived and will be dismissed.

6. Defendant's Paragraph Six and Seven have been passed on by the Florida Supreme Court on direct appeal, and the Court will not substitute its judgment in lieu of the Supreme Court's decision. Sullivan v. State 372 So2nd 938.

7. A review of the trial transcript reveals that the trial counsel was not ineffective in view of the totality of the trail, as stated in McKenna v. State 280 F2nd 592.

"We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."

8. The Defendant's motion alludes to ineffectiveness of counsel for trial counsel's failure to seek a stipulation from the State for the use and introduction of a polygraph examination.

It has repeatedly been held by the courts that polygraph examinations are inadmissible as irrelevant evidence.

9. This allegation of the motion, failure to object to inflammatory remarks made by the State Attorney requires no review, as Florida has consistantly held that same are waived when not objected to at trial.

10. Defendant's allegation as to trail counsel's failure to plea bargain is refuted by the record. The record reflects that the defendant rejected plea negotiations as propsed by the State.

The remaining allegations of Defendant's motion is totally without record evidence and are refuted by the trial transcript which are attached hereto and hereby made a part hereof by said attachment.

The Court having thoroughly considered said Motion to Vacate, it is

ORDERED that Defendant, VERNON RAY COOPER'S, Motion to Vacate be and the same is hereby denied.

DONE AND ORDERED at Pensacola, Escambia County, Florida this 23 day of October, 1980.

Jack H Hancock
CIRCUIT JUDGE

Copies to:

Curtis A. Golden, State Attorney
First Judicial Circuit

Raymond L. Marky
Asst. Attorney General

Judith J. Doughtery,
Asst. Public Defender

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ORIGINAL ON FILE IN THIS OFFICE
...NESS MY HAND AND OFFICIAL SEAL

LONNIE LEE MAGAHA
CLERK CIRCUIT COURT
ESCAMBIA COUNTY, FLORIDA

By: _____ D. C.